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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

VINOD C. BHAN, CRNA,

Petitioner,

v.

NME HOSPITALS, INC.,
NATIONAL MEDICAL ENTERPRISES, INC.
AND JOHN E. MENAUGH,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner herewith replies pursuant to Rule 15.6 to Respondents' opposition to the petition for certiorari.

INTRODUCTION

Despite years of attention by Congress, state governments and the courts, a national concern over escalating health care costs remains.[1] As detailed in the Petition, Congress has repeatedly recognized that hospitals are frequent collaborators in restraints of trade, including restraints affecting non-physicians. Respondents make no attempt to refute the importance of these issues.

While the Circuits are in conflict, the better-reasoned view is that horizontal restraints that limit or eliminate competition from an entire class of professionals are either unreasonable per *se* or facially anticompetitive. The *per se* rule is particularly fitting where the excluded class typically charges less.[2] As there is no affirmative evidence of procompetitive justification in this case, under either standard summary judgment for the defendants was not merited.

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[1] See, e.g., *New York Times*, November 8, 1991, Vol. CXLI, No. 48,778, p. 1, col.6 ("Heeding Elections, Lawmakers Offer Health-Care Ideas").

[2] After Mr. Bhan's exclusion from Manteca Hospital a pricing anomaly was discovered in that the billing service used by both Mr. Bhan and the MDAs billed both CRNA and MDA anesthesia at supra-competitive prices. (Petitioner cited that fact in the courts below as evidence of a Manteca market.) That fact does not change the significance of the lower cost of CRNA anesthesia (see Pet. at 3, n. 2 and accompanying text; *Bhan II*, 929 F.2d 1407, Pet. App. at 2), nor does it speak to what anesthesia charges would have been had Mr. Bhan been allowed to compete with the MDAs at Manteca Hospital. The mere fact that prices dropped temporarily after the anomaly was discovered does not immunize the anti-competitive exclusion from antitrust scrutiny. *Key Enterprises of Delaware, Inc. v. Venice Hosp.* 919 F.2d 1550, 1560 at headnote 3 (11th Cir. 1990).

REPLY ARGUMENT

I. THE RATIONALE OF *PINHAS* AND *KLOR'S* APPLIES TO THIS CASE.

This Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) does not have the sweeping implications Respondents seek to read into it. The Court did not overrule *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) in that decision. If the Court had meant to do so, it would have said so, and doubtless it would have cited *Klor's* quite differently this year in *Pinhas*.

Northwest Wholesale Stationers itself cites *Klor's* three times. 472 U.S. at 290, 293 and 294. The Court carefully distinguished Pacific Stationery's position from that of the plaintiff in *Klor's* (472 U.S. at 294, column 2), thereby affirming the continuing vitality of *Klor's*.

Both the dissent and the majority opinion in *Pinhas* cite *Klor's* without criticism. *Summit Health, Ltd. v. Pinhas*, 500 U.S. ___, 111 S.Ct. 1842, 1848, 1851 (1991). *Pinhas* indicates the Court's continuing adherence to the *per se* rule of *Klor's*, at least as to certain kinds of boycotts. This principle, disputed by the Respondents (Respondents' Brief at 4-5), has been recognized by the Fourth Circuit. In *Shafi v. St. Francis Hospital*, 1991-2 Trade Cas. (CCH) ¶ 69,500 (4th Cir. July 16, 1991), the Fourth Circuit cited *Pinhas* in vacating a summary judgment entered by the district court because of the plaintiffs "[f]ailure to identify the relevant market..." *Id.* at p. 66,135. *Shafi* thus relied on *Pinhas* in ruling on a substantive question of group boycott illegality. Accordingly, the continuing vitality of the *Klor's* rationale calls for reversal in this case.

II. *NORTHWEST WHOLESALE STATIONERS* DOES NOT NEGATE THE CONTINUING CONFLICT AMONG THE CIRCUITS.

While Respondents are correct that *Northwest Wholesale Stationers* held that not all concerted refusals to deal are *per se* illegal, it did not hold that none are. Thus, Respondents' conclusion that the *per se* ruling in *Weiss v. York Hospitals*, 745 F.2d 786 (3d Cir. 1984) "has been implicitly overruled by this Court" (Respondents' Brief at 6) is a *non sequitur*.

The continuing validity of *Weiss* has been recognized by cases in the Third Circuit and elsewhere. The appellate courts have read *Northwest Wholesale Stationers* variously, particularly in cases alleging group boycotts of health care professionals.[3] No Circuit,

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[3] As noted below the Third and apparently the Fourth Circuits continue to believe that a group boycott which excludes a class qualifies for *per se* treatment.

The Second and Eighth Circuits believe that the *per se* rule applies when there is concerted action "at some horizontal level" and analyze other concerted refusals to deal under the rule of reason. *Lomar Wholesale Grocery v. Dieter's Gourmet Foods*, 824 F.2d 582, 590, 591 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988), quoted in *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F.Supp. 915, 931 (E.D. Mo. 1990), and in turn quoting *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 132 n. 6 (2d Cir. 1978).

The Fifth Circuit interprets *Northwest Wholesale Stationers* as excluding from the *per se* category boycotts arising from legitimate standard setting practices which counter an inference of anti-competitive purpose. *Goss v. Memorial Hosp. System*, 789 F.2d 353, 355 (5th Cir. 1986) (suspension of obstetrician for questioned competency through peer review process). *Consolidated Metal Prod. v. Amer. Petro. Institute*, 846 F.2d 284, 292 (5th Cir. 1988) (voluntary standard setting by voluntary trade association).

(continued...)

however, has held that *Northwest Wholesale Stationers* overruled *Weiss*, as Respondents contend.

The Third Circuit itself has declined to decide the effect of *Northwest Wholesale Stationers* on *Weiss*. *Miller v. Indiana Hosp.*, 843 F.2d 139, 144 n. 6 (3d Cir.), *cert. denied*, 488 U.S. 870 (1988), *see Fuentes v. South Hills Cardiology*, ___ F.2d ___, 1991-2 Trade Cas. (CCH) ¶ 69,599 (3d Cir. October 1, 1991). After this Court decided *Northwest Wholesale Stationers*, several decisions within the Third Circuit, including one issued this year, have cited *Weiss* as authoritative on the question of the *per se* rule as applied to group boycotts. *Brown v. Our Lady of Lourdes Medical Center*, 767 F.Supp. 618, 628 (D. N.J. 1991); *Northwest Woman's Center v. McMonagle*, 670 F.Supp. 1300, 1303 n. 3 (E.D. Pa. 1987); *Friedman v. Delaware County Hosp.*, 672 F.Supp. 171, 189 (E.D. Pa. 1987).

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[3](...continued)

Similarly, authority from the Sixth Circuit suggests that boycotts of health care professionals should generally be treated under the rule of reason when they are ancillary to pro-competitive cooperation among competitors; *Hassan v. Independent Practice Associates, P.C.*, 698 F.Supp. 679 (E.D. Mich. 1988) (upholding exclusion of competing doctors who refuse to subscribe to cost containment rules which enabled the defendant independent practice association to compete for health maintenance organization business). *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir.) *cert. denied* 499 U.S. 1033 (1986).

The Seventh Circuit in *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1155 (7th Cir. 1984) (*en banc*), *rev'd on other grounds*, 470 U.S. 373 (1985)) opined that boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se*. However, the two *Wilk* decisions discussed in the Petition expressly applied the Rule of Reason to a health care boycott solely for quality of care "ethical" reasons.

Other circuits, while distinguishing or disagreeing with *Weiss*, recognize its continuing validity. In *Oksanen v. Page Memorial Hospital* __ F.2d __, 1991-2 Trade Cas. (CCH) ¶ 69,562 at p. 66,489 (4th Cir. September 4, 1991) the Fourth Circuit distinguished *Oksanen* from *Weiss* as follows: "[t]his case is not one in which a representative of a *class of competitors* is being excluded from the market. *Cf.* ... *Weiss* (attempt to exclude osteopath)." (Emphasis added.) *See also, Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F.Supp. 1186, 1193 (W.D. N.C. 1988); *Collins v. Associated Pathologists, Ltd.*, 676 F.Supp. 1388, 1399, (C.D. Ill. 1987), *aff'd*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988).

Indeed, *Weiss* was cited by Justice Scalia in his dissent in *Pinhas* on the identification of the "infected activities" for interstate commerce purposes. 500 U.S. at __, 111 S.Ct. at 1850, 114 L.Ed.2d at 379. Moreover, the dissent nowhere suggests that *Weiss* was wrong, and notes without qualification that "group boycotts are *per se* violations ... because they deprive at least some consumers of a preferred provider .... ." *Ibid.* (citation omitted).

III. THE RESTRAINT SHOWN IN THIS CASE IS UNREASONABLE UNDER THE ANALYSIS THIS COURT DESCRIBED IN *INDIANA FEDERATION OF DENTISTS*

A. The Restraint Is Facially Anticompetitive.

Respondents note that this Court's ruling in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), as involved "an agreement 'to withhold from their

customers a particular service that they desire'[4] and evidence of ... anticompetitive effects resulting from that agreement' (Respondents' Brief at 7, quoting 476 U.S. at 459). As both lower courts observed, Mr. Bhan presented sufficient conspiracy evidence to avoid summary judgment on that ground. *Bhan v. NME Hospitals*, 669 F.Supp. 998, 1017 (E.D.Cal. 1987), Pet. App. at 63-64; *aff'd*, 929 F.2d 1404, 1410 (9th Cir. 1991), Pet. App. at 8. Petitioner submits that the permanent exclusion of a lower-priced class of competitors, even from a single hospital, is a sufficient showing of anticompetitive effects under *Indiana Federation of Dentists*. All CRNAs are permanently barred from competing for the services previously provided by Mr. Bhan and his MDA competitors.

B. The Restraint Arose From Anticompetitive Motives

Moreover, to the extent that *Indiana Federation of Dentists* relied on evidence of anticompetitive purpose, such evidence is abundant in this case -- certainly enough to create a triable issue of fact. Respondents, who include hospital administrator Menaugh, make no attempt to refute the evidence Petitioner cited that the

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[4] Actually, the Indiana dentists were withholding x-rays from their customers' *insurers*, and the Court's opinion does not address whether dental *patients* cared about the restraint. Similarly in this case, the restraint serves to prevent the surgeons, who typically take responsibility for arranging for anesthesia services, from choosing CRNA care, whether for potential cost savings which primarily benefit patients' insurers, or to obtain the services of a particular desired provider such as Mr. Bhan.

conspirators' motives were anticompetitive.[5] Such evidence of anticompetitive animus requires reversal of the summary judgment entered by the district court. *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 243 (1980) (Section 1 violation may be shown by "*either* an unlawful purpose or an anticompetitive effect" (citations omitted; emphasis in original)); *see Chicago Board of Trade v. United States*, 246 U.S. 231, 239 (1918) ("Knowledge of intent may help the court to interpret facts and to predict consequences").

C. The Record Supports No Justification.

At best, the Ninth Circuit's rationale suggests that by eliminating CRNAs Manteca Hospital *may* make its surgeons happier, leading in the long run to more patients being admitted to its facility for surgery, and hence more income to the hospital as well as the independent professionals in the surgical suite. This is an increase it income, not competition. As illustrated recently in *Chicago Pro Sports*, 754 F.Supp. 1336, 1362-1364 (N.D. Ill. 1991), such purported justifications "must be rejected on principle. ... 'We do it because it's more profitable' is not a defense under the Sherman Act." 754 F.Supp. at 1359. Like the reduction of "output" from 25 to 20 basketball games to be televised on "superstations" in *Chicago Pro Sports*, restricting anesthesia input by excluding one of the two classes of providers to enhance MDA incomes is facially anticompetitive.

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[5] Respondents concede that a motive for the exclusion of CRNAs including Mr. Bhan was "the realization that the hospital could not support more than two anesthesia providers." Respondents' Brief at 2. "Support" here refers to the number of cases: the hospital did not pay, or handle billing for, its anesthesia providers.

Where the restraint is accomplished by ruling out an entire class of competitor -- as if the NBA had sought to ban superstation telecasts altogether -- the result is a "'naked restraint of trade with no purpose except stifling of competition... .'" *Broadcast Music Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 19-20 (1979), quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Further, unlike the basketball broadcast restraint, there is no contention in this case that the exclusion of CRNAs was "ancillary" to a lawful business arrangement. *Cf., Chicago Pro Sports*, 754 F.Supp. at 1357-1358. While defendants' motives may present triable issues if a "patient care defense" is available, that the naked restraint shown in this case may profit its participants is no reason to require detailed proof of market power. Class-based exclusions of lower-priced health care professionals, if not held unlawful *per se*, are nonetheless unreasonable restraints of trade.

D. The Effects Are Anticompetitive.

Respondents concede that the economics of a single hospital's anesthesia business motivated the decision to exclude CRNAs.[6] The impact on that hospital's anesthesia business is facially anticompetitive.

As the Ninth Circuit's opinion notes, *Indiana Federation of Dentists* accepted as sufficient a finding that the dentists' conspiracy had succeeded in thwarting insurers' demands for x-rays in "at least two localities." 929 F.2d at 1413 n. 10. Despite the absence of any proof that those towns were relevant markets, this Court accepted that evidence as a sufficient showing of anticompetitive effects. The elimination of all CRNAs

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[6] See note 5, *supra*.

from the only acute care hospital in Manteca deserves similar treatment.

CONCLUSION

As in *Pinhas*, the denial of hospital access in this case implicates competition irrespective of the competition among hospitals for patients. Unlike *Pinhas*, this case presents a *class-based* exclusion which merits per se condemnation.

This case provides a valuable opportunity to instruct the lower courts that they must first focus on evidence of anticompetitive purpose and effect, and address market definition and potential justifications only where evidence of purpose or effect is counterbalanced by a demonstrable benefit to competition.

For the above reasons and those set forth in the Petition, the writ should issue and the judgment of the court of appeals be reversed.

Respectfully submitted,
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